

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL S. ROMA,

06-CV-0025

v.

ORDER

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

This action was initially brought pursuant to 42 U.S.C. § 405(g) to review the final decision of the Commissioner of Social Security (the "Commissioner") which denied plaintiff's claim for Disability Insurance Benefits and Supplemental Security Income payments pursuant to Title XVI of the Social Security Act. The matter was referred to Magistrate Judge Jeremiah J. McCarthy on October 9, 2007 to make a determination of the factual and legal issues presented and to prepare and file a Report and Recommendation containing a recommended disposition of the issues raised. Plaintiff brought this action on January 12, 2006 to challenge the determination of the Commissioner who found that he was not disabled within the meaning of the Social Security Act. Thereafter both the plaintiff and defendant moved for judgment on the pleadings and the parties submitted memoranda.

By Decision and Order and Report and Recommendation dated March 14, 2008, Magistrate Judge McCarthy found that the Commissioner's determination denying plaintiff's benefits from the

period April 17, 2004 onwards was not supported by substantial evidence and that the case was to be remanded for further administrative proceedings in accordance with his findings. Although the parties were advised of their right to file objections to Judge McCarthy's Report and Recommendation, the potential consequences of failing to file objections, and the deadline for filing such objections, neither party has filed any objection to Judge McCarthy's Report.

Because neither party has filed an objection to the March 14, 2008 Report and Recommendation, the parties have waived their rights to de novo review pursuant to 28 U.S.C. § 636(b)(1). See Caidor v. Onondaga County, 517 F.3d 601, 604 (2d Cir.2008); U.S. v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). In addition, the Second Circuit has by rule adopted the position that where the parties have received notice of the consequences of failing to object to a Magistrate Judge's Report and Recommendation, such a failure will preclude any further review of a Decision adopting a Magistrate Judge's Report and Recommendation. See Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir.1989) ("failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision"); see also Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir.1988).

I find that Magistrate Judge McCarthy's recommendation that the matter should be remanded to the Commissioner to "make factual findings regarding the weight assigned to Dr. Dudzik's April 26, 2005 RFC assessment," to "properly analyze step five of the sequential evaluation in light of the RFC findings made upon remand," and that the vocational expert testimony should be based on hypothetical questions that "accurately state plaintiff's limitations and RFC" is supported by the record. See Report and Recommendation, page 15). Because there is no clear error in Magistrate Judge McCarthy's Report and Recommendation, I adopt his March 14, 2008 Report and Recommendation in its entirety.

ALL OF THE ABOVE IS SO ORDERED.

s/Michael A. Telesca
Michael A. Telesca
United States District Judge

DATED: Rochester, New York
April 23, 2008